INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional and statutory provisions involved	2
Statement	3
Argument	7
Appendix	11–14

CITATIONS

Cases:

Boyd v. *United States*, 116 U.S. 616	8
Bookbinder v. *United States*, 287 Fed. 790, certiorari denied, 262 U.S. 748	8
Byars v. *United States* 273 U.S. 28	7
Cincinnati H. & D. R. Co. v. *Thiebaud*, 114 Fed. 918	12
City of Detroit v. *Grummond*, 121 Fed. 963	14
Crowe v. *Trickey*, 204 U.S. 228	12
Gouled v. *United States*, 255 U.S. 298	8
Grau v. *United States*, 287 U.S. 124	8
Gunnison County Commissioners v. *Rollins*, 173 U.S. 255	12
Herbert v. *Butler*, 97 U.S. 319	12
In Re 14 East Seventeenth Street, etc., 57 F. (2d) 212	8
Johnson v. *Garber*, 73 Fed. 523	12
Key v. *United States*, 26 F. (2d) 241	12
Locke v. *United States*, 7 Cranch 339	8
Pappas v. *Lufkin*, 17 F. (2d) 988	9
Rice v. *United States*, 24 F. (2d) 479	9
Ripper v. *United States*, 178 Fed. 24	9
Schencks v. *United States*, 2 F. (2d) 185	9
Shue, Chin K., In re, 199 Fed. 282	9
Taylor v. *Maddux, Marshall & Co.* 4 F. (2d) 447	12
United States v. *Armstrong*, 275 Fed. 506	9
United States v. *Clark*, 18 F. (2d) 442	8
United States v. *Federal Mail Order Corporation*, 47 F. (2d) 164	9
United States v. *Jarvis*, Fed. Cas. # 15469, 26 Fed. Cas. 593	12

CITATIONS—Continued

	Page
Cases—Continued	
United States v. *Lai Chew*, 298 Fed. 652	8
United States v. *Moore*, 4 F. (2d) 600	8
United States v. *Pitotto*, 267 Fed. 603	9
United States v. *Rykowski*, 267 Fed. 866	9
United States v. *Swan*, 15 F. (2d) 598	9
Wagner v. *United States*, 8 F. (2d) 581	9
Walton v. *Southern Pac. Co.*, 53 F. (2d) 63	12
Woods v. *United States*, 279 Fed. 706	9
Constitution and Statutes:	
Fourth amendment	2
Revised Statutes:	
Sec. 953 as amended (U.S.C., Title 28, Sec. 776)	12
Sec. 3462 (U.S.C., Title 26, Sec. 1195)	9
Tariff Act of 1922, c. 356, Title IV, Sec. 595, 42 Stat. 858, 983 (U.S.C., Title 19, Sec. 499)	2–3
Miscellaneous:	
24 Op.A.G. 685	9

In the Supreme Court of the United States

OCTOBER TERM, 1932

No. 915

J. J. NATHANSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINIONS BELOW

No opinion was rendered by the District Court. The opinion of the Circuit Court of Appeals (R. 29–34) has not yet been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered March 1, 1933 (R. 35). The petition for certiorari was filed April 26, 1933. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the trial court erred in refusing to exclude evidence obtained upon a warrant to search a dwelling house issued, under Section 595 of the Tariff Act of 1922, to a customs officer upon the officer's sworn statement that he had cause to suspect and did believe that imported liquors upon which the duties had not been paid were deposited in the dwelling house to be searched.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Section 595 of the Tariff Act of 1922, c. 356, Title IV, 42 Stat. 858, 983 (U.S.C., Title 19, Sec. 499), provided, so far as material here:

> WARRANT.—If any collector of customs or other officer or person authorized to make searches and seizures shall have cause to suspect the presence in any dwelling house, store, or other building or place of any merchandise upon which the duties have not been paid, or which has been otherwise brought into the United States contrary to law, he

> may make application, under oath, to any justice of the peace, to any municipal, county, State, or Federal judge, or to any United States commissioner, and shall thereupon be entitled to a warrant to enter such dwelling house in the daytime only, or such store or other place at night or by day, and to search for and seize such merchandise * * *.

STATEMENT

Petitioner was charged in an information filed in the District Court of the United States for the District of New Jersey with the possession of whiskey and other intoxicating liquor in violation of the National Prohibition Act (R. 4–5). According to the docket entries appearing in the record, a motion to suppress evidence was made and denied before trial (R. 1–2). At the trial this motion was renewed but decision was reserved pending the "coming in of the testimony in the case" (R. 11–12). At the close of the Government's case petitioner again moved to suppress the evidence and to set aside the search warrant upon which it had been obtained on the ground that the warrant had issued without probable cause. The motion was denied and an exception was prayed and allowed (R. 20). A motion for a directed verdict was also denied (R. 20). The defense having rested without introducing testimony, the court, acting by consent without a jury (R. 2), found petitioner guilty (R. 20), and sentenced him to pay a fine of $500 (R. 3).

Upon appeal to the Circuit Court of Appeals the judgment was affirmed (R. 35).

At the trial the Government called as its sole witness one Laughlin, a customs officer, who testified in substance as follows: On May 1, 1930, the witness visited the premises in question, located in Atlantic City, New Jersey, pursuant to a search warrant which he had obtained from a Judge of Common Pleas of Atlantic County. The witness found no one "in" when he arrived at the house. After waiting "a considerable length of time," he went around the house and, looking through a window into the cellar, observed a quantity of marine equipment and "a few bottles of liquor." He thereupon entered the cellar and found therein the liquors which were listed on the back of the warrant.[1] While the

[1] In an affidavit accompanying the criminal information the customs officer stated that upon inspecting the premises from the outside he found that "each of the cellar windows was backed up by a heavy wooden shutter secured by a crossbar," that "finding one of the cellar windows slightly open and the wooden shutter behind it about 2" down from the top, I looked through the opening and observed a quantity of marine equipment, * * * several casks and some liquor in bundles," that "having observed this liquor, I removed the shutter and made an entrance into the cellar followed by Inspector Boeger," that in addition to a large quantity of liquors of foreign origin he found "a complete cutting plant * * * consisting of alcohol in 5 gal. tins, distilled water, extracts, such as oil of fennel, oil of juniper, etc., as well as labels, corks, seals and counterfeit revenue stamps," and that this latter material was turned over to agents of the prohibition service (R. 7–9).

search was in progress, but after the liquors had been found, a lady who said that she was an occupant of the house, and who the witness believed was Mrs. Nathanson, appeared and the witness handed her the warrant with a receipt for the liquors on the back thereof (R. 11–13).

Upon cross-examination Laughlin testified that the premises searched consisted of a dwelling house occupied by the petitioner; that in the affidavit made by the witness before the county judge he had stated that he "had cause and suspicion and did believe" that liquors of foreign origin were contained in the premises; that the witness' belief was based upon information received by him from the prohibition agent in charge at Atlantic City, who told the witness that he and his men had recently seen sacks taken into the house at night, but did not know what was in them. The witness further stated that at the time he applied for the search warrant he had additional information from an informer and had so told the county judge. He was thereupon asked the name of the informer, but an objection by the Government to this question was sustained (R. 15–19).

While the affidavit upon which the search warrant issued does not appear in the record, the following statement appears in the opinion of the Circuit Court of Appeals (R. 30):

> The affidavit of the customs agent set forth that the affiant "has cause to suspect

> and does believe that certain merchandise, to wit: liquors of Canadian and other foreign origin, a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson."

And the search warrant recited (R. 14):

> Whereas said Francis B. Laughlin has stated under his oath that he has cause to suspect and does believe that certain merchandise, to wit: Certain liquors of foreign origin a more particular description of which cannot be given, upon which the duties have not been paid, or which has otherwise been brought into the United States contrary to law, and that said merchandise is now deposited and contained within the premises of J. J. Nathanson said premises being described as a 2 story frame dwelling located at 117 No. Bartram Ave., Atlantic City, N.J.; and
>
> Whereas said Francis B. Laughlin has requested that a warrant issue to him, authorizing him to enter said premises and search for and seize said merchandise:
>
> NOW THEREFORE, YOU ARE COMMANDED, in the name and by the authority of the President of the United States, to enter and search the premises hereinbefore described * * *.

See also R. 7.

ARGUMENT

If the question presented by the petition for certiorari was preserved for appellate review by a proper bill of exceptions,[2] we do not oppose the issuance of the writ.

While the affidavit upon which the search warrant in the instant case was based does not appear in the record, it is stated in the opinion of the Circuit Court of Appeals (R. 30) that the affidavit of the customs officer averred that he "has cause to suspect and does believe" that certain merchandise of foreign origin upon which the duties had not been paid or which had otherwise been brought into the United States contrary to law, "is now deposited and contained" in the dwelling house of the petitioner[3] (R. 14). While apparently the language of the affidavit follows that of Section 595 of the Tariff Act of 1922 (*supra*, p. 2), under which the warrant issued there may be doubt whether the warrant satisfied the requirements of the Fourth Amendment (*supra*, p. 2). It contains no finding as to the existence of probable cause, and was based upon an affidavit which evidently recited no facts justifying the making of any such finding. See

[2] See Appendix, *infra*, pp. 11–13.

[3] A similar recital is found in the warrant (R. 14). There is nothing in the record to indicate that the affidavit contained any further allegations with respect to the issue of probable cause and the case appears to have been tried by both courts below upon the theory that the affidavit contained no facts showing the basis of the officer's suspicion and belief.

Byars v. *United States*, 273 U.S. 28, 29; *Grau* v. *United States*, 287 U.S. 124, 127.

The court below held, in effect, that an exception to the usual rule as to probable cause exists in the case of warrants to search for smuggled goods. It said that the Government has a pecuniary interest in such goods and that it has been recognized by certain decisions of this Court that ever since the beginning of the Government searches for contraband smuggled into the United States in fraud of the revenue may be made "upon affidavits setting forth an allegation of probable cause based upon suspicion" (R. 31). We have examined the decisions of this Court to which the court below refers (*Locke* v. *United States*, 7 Cranch 339; *Boyd* v. *United States*, 116 U.S. 616; and *Gouled* v. *United States*, 255 U.S. 298), but we do not read those cases as holding that the requirements of the Fourth Amendment do not apply to applications for warrants to search for smuggled contraband. However, the decision of the court below is supported by its previous decision in *Bookbinder* v. *United States*, 287 Fed. 790, certiorari denied, 262 U.S. 748,[4] as well as by the cases of *United States* v. *Moore*, 4 F. (2d) 600 (Me.), and *In Re 14 East Seventeenth Street, etc.*, 57 F. (2d) 212 (S.D.N.Y.). These decisions are opposed by *United States* v. *Lai Chew*, 298 Fed. 652 (N.D. Cal.), and *United*

[4] Examination of the petition for certiorari in the *Bookbinder case* discloses that the question here presented was not urged.

States v. *Clark*, 18 F. (2d) 442 (Mont.). See also *In re Chin K. Shue*, 199 Fed. 282 (Mass.); *Pappas* v. *Lufkin*, 17 F. (2d) 988 (Mass.); *United States* v. *Federal Mail Order Corporation*, 47 F. (2d) 164 (C.C.A. 2d).

It should also be pointed out that under Section 3462 of the Revised Statutes (U.S.C., Title 26, Sec. 1195), which provides for the issuance of search warrants to any internal-revenue officer "if such officer makes oath in writing that he has reason to believe, and does believe, that a fraud upon the revenue has been or is being committed upon or by the use of the * * * premises", it has been uniformly held that such a warrant may issue only upon an affidavit reciting facts showing probable cause. *Ripper* v. *United States*, 178 Fed. 24, 26 (C.C.A. 8th); *Woods* v. *United States*, 279 Fed. 706, 709–710 (C.C.A. 4th); *Schencks* v. *United States*, 2 F. (2d) 185, 187 (App.D.C.); *Wagner* v. *United States*, 8 F. (2d) 581, 584 (C.C.A. 8th); *United States* v. *Rykowski*, 267 Fed. 866, 868–869 (S.D. Ohio); *United States* v. *Pitotto*, 267 Fed. 603, 604 (Ore.); *United States* v. *Armstrong*, 275 Fed. 506, 508 (S.D. Fla.). See also 24 Op. A. G. 685, 688; *United States* v. *Swan*, 15 F. (2d) 598, 599 (N.D. Cal.); *Rice* v. *United States*, 24 F. (2d) 479, 480 (C.C.A. 1st).

The statute under which the warrant involved in the instant case was issued applies not only to intoxicating liquor imported contrary to law but to any merchandise so imported. The divergent views

of the various courts which have passed on the question presented indicate that it is not free from doubt. Although but one Circuit Court of Appeals has, so far, considered the question, we think it is of sufficient importance to warrant the issuance of the writ.

Respectfully submitted.

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MAY 1933.

APPENDIX

DISCUSSION OF QUESTION WHETHER THERE WAS A PROPER BILL OF EXCEPTIONS

The testimony and documentary evidence relating to the search and seizure in question and the exception to the action of the District Judge in denying the defendant's motion to suppress appear in what is designated in the record as "Transcript of proceedings taken before Honorable John Boyd Avis, February 29, 1932." (R. 10–26.) The signature of the trial judge does not appear at the conclusion of this "Transcript," and there is lacking in the record the usual statement or certificate of the trial judge as to the authenticity of the bill of exceptions. However, immediately following the request of counsel for the petitioner for the allowance of an exception to the denial of his motion to suppress, there appears the following:

> (Defendant's counsel prays an exception, which is herel[b]y allowed and sealed accordingly.
>
> JOHN BOYD AVIS,
> (Sealed)).
>
> Mr. PEARSE. I now move for direction of a verdict.
>
> The COURT. The motion to direct will be denied. Do both parties rest?
>
> Mr. PEARSE. Yes.
>
> The COURT. A verdict of conviction will be rendered * * *

It would seem, therefore, that the allowance, signing, and sealing of the exception occurred at the

time that the exception was taken (although it does not appear that the proceedings were stopped until the evidence could be written up) and not subsequent to the trial, as is the usual practice. But we do not know of any reason why this may not be done. The rule that a bill of exceptions may be settled and allowed after the trial is obviously merely a rule of convenience. *Johnson* v. *Garber,* 73 Fed. 523 (C.C.A. 6th), and cases cited.

That the document containing the evidence and the exception was not entitled a "Bill of Exceptions" is, of course, immaterial. *Herbert* v. *Butler,* 97 U.S. 319, 320.

There would seem to be no question that the statutory requirement as to authentication was met by the signature of the District Judge who tried the case. R.S. Sec. 953, as amended (U.S.C., Title 28, Sec. 776); see also *United States* v. *Jarvis,* Fed. Cas. #15469, 26 Federal Cases 593, 595; *cf. Walton* v. *Southern Pac. Co.,* 53 F. (2d) 63, 65 (C.C.A. 9th). It was unnecessary for the judge to attach his seal. *Herbert* v. *Butler, supra.*

Nor was it necessary that the judge certify that the evidence set forth in the document was all the evidence which related to the exception. Such a certificate may be dispensed with if it may be fairly implied that all of the pertinent evidence was included in the bill. *Gunnison County Commissioners* v. *Rollins,* 173 U.S. 255, 262; *Crowe* v. *Trickey,* 204 U.S. 228, 235; *Taylor* v. *Maddux, Marshall & Co.,* 4 F. (2d) 447, 448 (App. D.C.); *Cincinnati H. & D. R. Co.* v. *Thiebaud,* 114 Fed. 918, 920–921 (C.C.A. 6th), but see *Key* v. *United States,* 26 F. (2d) 241, 242 (C.C.A. 8th). It would appear to be a reasonable inference from the frame of the

"transcript of proceedings" in the instant record and the recitals therein that it contained not only all the evidence relating to the denial of the motion to suppress but, indeed, all of the evidence introduced at the trial.

The "transcript of proceedings" indicates that the only witness called at the trial was one Laughlin, the customs officer who made the search. He was called by the Government (R. 11). Immediately after he took the stand to testify the counsel for the defendant renewed his motion to suppress and asked "that the testimony be heard by the court and decision reserved pending the taking of testimony as to the manner in which the agent obtained his information" (R. 11). When questioned by the court as to whether this meant that counsel desired to examine the witness in advance, counsel replied, "Not in advance. I am asking Your Honor to reserve decision until the coming in of the testimony in the case," to which the court assented (R. 11–12). Following the cross-examination of the witness by counsel for the defense (R. 19), the latter stated that "so far as the information against Jeremiah J. Nathanson is concerned, that is the facts relating to that information" (the criminal information filed against the petitioner). This was followed by a renewal by defendant's counsel of the motion to suppress, the denial of that motion, and the allowance, signing and sealing of the exception to the court's action (R. 20). Counsel for the defendant then immediately moved for a directed verdict, which was denied, after which both parties rested their case (R. 20). The court then announced that a verdict

of conviction would be rendered against the defendant (R. 20).

Also pertinent to the question whether the "transcript of proceedings" contained all the evidence is the fact that the record shows that the United States Attorney signed a stipulation that "the foregoing is a true transcript of the record of the said District Court in the above matter as agreed upon by the parties" (R. 25), and that the clerk of the District Court certified that "the annexed is a true copy of the transcript of record * * * as agreed upon by the parties per the foregoing stipulation * * *." *Cf. City of Detroit* v. *Grummond*, 121 Fed. 963 (C.C.A. 6th).

U. S. GOVERNMENT PRINTING OFFICE: 1933